M Morita Management Sdn Bhd & Anor v Ambank (M) Bhd (previously known as AmFinance Bhd and prior to that known as MBF Finance Bhd which took over the assets, business and liability of Arab-Malaysian Finance Bhd via vesting order dated 21 May 2012) and another appeal

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NOS WA-12ANCC-86–10 OF 2017 AND WA-12ANCC-87–10 OF 2017

NOORIN BADARUDDIN J

27 APRIL 2018

Limitation — Accrual of cause of action — Fresh accrual of cause of action — Respondent filed action against appellants to claim for balance of unpaid loan — Sessions court judge allowed summary judgment application by respondent and dismissed striking out application by appellants — Whether respondent's claim time barred — Whether cause of action against appellants would re-accrue once respondent had ascertained balance of proceed of sale — Whether respondent's action estopped by laches

The respondent had granted a housing loan to the appellants. Due to a breach by the appellants, the property assigned to the respondent was auctioned off but from the proceed of the sale, there was still a shortfall amounting to RM601,996.23. Due to the shortfall amount, the respondent had issued letter of demand dated 28 February 2017 demanding the amount owing by the appellants. The respondent then filed an action against the first appellant as borrower and the second appellant as the guarantor of the housing loan for a sum of RM601,996.23. The learned sessions judge had allowed the summary judgment application filed by the respondent pursuant to O 14 of the Rules of Court 2012 ('the ROC') and dismissed the striking out application by the appellants filed under O 18 r 19(1)(b) and (d) of the ROC. Dissatisfied with the decision, the appellants filed the present appeals. The main thrust of the appellants' contention in both the appeal was that the respondent's claim in particular against the second appellant as guarantor pursuant to the letter of guarantee was time barred as the claim was said to have been made more than six years and the respondent was estopped by s 6 of the Limitation Act 1953. Premised on that contention, the appellants also alleged that the respondent's claim was estopped by laches.

Held, dismissing both the appeals with costs:

(1) Since the appellants had agreed on the terms/conditions requiring the respondent to proceed with foreclosure action first and followed by the

A shortfall claim (in personam) if any; after the proceeds of sale, the parties were bound by the terms of the agreement including the second appellant towards the letter of guarantee whereby the liability of the appellants in personam would re-accrue if there was any shortfall to be claimed after the proceed of sale. That was the intention of the loan agreement and the B letter of guarantee. Therefore, it was a basic justice for the court to preserve the terms and conditions of the parties' agreement. The appellants' allegation on the issue of laches was irrelevant since the respondent was still within the first year after the cause of action re-accrued (see paras 12 & 16).

C (2) Further at equity, foreclosure action also ought to be initiated first before civil action as the property charged to the respondent was a security pledged to be realised in order to reduce the outstanding amount owing by the appellants. The court was satisfied that the appellants had failed to raise any triable issues and therefore, the question of law on limitation D and laches were rejected (see paras 17 & 20).

(3) The court upheld the dismissal of the appellants' application pursuant to O 18 r 19 of the ROC by the learned sessions judge as the respondent was still within the time prescribed to proceed with the claim of the shortfall E of the amount due and owing by the appellants after the auction and proceed of sale. The respondent had acted on equitable manner and had complied with the terms and condition of the loan agreement and letter of guarantee which were agreed upon by the parties (see para 21).

F **[Bahasa Malaysia summary**

Responden telah memberikan pinjaman perumahan kepada perayu-perayu. Akibat kemungkiran oleh perayu-perayu, hartanah yang diserahhakkan kepada responden dilelong tetapi daripada hasil jualan tersebut, masih terdapat kurangan berjumlah sebanyak RM601,996.23. Akibat jumlah kurangan G tersebut, responden telah mengeluarkan surat tuntutan bertarikh 28 Februari 2017 menuntut jumlah yang perlu dibayar oleh perayu-perayu. Responden kemudiannya memfailkan tindakan terhadap perayu pertama sebagai peminjam dan perayu kedua sebagai penjamin pinjaman perumahan tersebut untuk jumlah RM601,996.23. Hakim sesyen yang bijaksana telah H membenarkan permohonan penghakiman ringkas yang difailkan oleh responden berikutan A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan menolak permohonan pembatalan oleh perayu-perayu yang difailkan di bawah A 18 k 19(1)(b) dan (d) KKM. Tidak berpuas hati dengan keputusan, perayu-perayu memfailkan rayuan-rayuan ini. Teras utama hujahan I perayu-perayu dalam kedua-dua rayuan adalah bahawa tuntutan responden terutamanya terhadap perayu kedua sebagai penjamin berikutan kepada surat jaminan adalah dihalang masa kerana tuntutan adalah dikatakan dibuat lebih daripada enam tahun dan responden diestop oleh s 6 Akta Had Masa 1953. Berdasarkan hujahan tersebut, perayu-perayu juga mendakwa bahawa

tuntutan responden diestop oleh *laches*.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Memandangkan perayu-perayu telah bersetuju atas terma-terma/syarat-syarat mengkehendaki responden untuk meneruskan terdahulu dengan tindakan perampasan dan kemudiannya diikuti dengan tuntutan kurangan (*in personam)* jika terdapat; selepas hasil jualan, pihak-pihak terikat dengan terma-terma perjanjian termasuk perayu kedua terhadap surat jaminan di mana liabiliti perayu-perayu in personam akan terakru semula jika terdapat apa-apa kurangan untuk dituntut selepas hasil jualan. Ini adalah niat perjanjian pinjaman dan surat jaminan. Oleh itu, ia adalah asas keadilan untuk mahkamah memelihara terma-terma dan syarat-syarat perjanjian pihak-pihak. Tuduhan perayu-perayu atas isu laches tidak relevan memandangkan responden masih dalam tahun pertama selepas kausa tindakan terakru semula (lihat perenggan 12 & 16).

(2) Selanjutnya pada ekuiti, tindakan perampasan juga patut dimulakan terdahulu sebelum tindakan sivil memandangkan hartanah dicaj kepada responden adalah jaminan yang diikrar untuk direalisasikan bagi mengurangkan jumlah yang belum dibayar oleh perayu-perayu. Mahkamah berpuas hati bahawa perayu-perayu telah gagal untuk membangkitkan apa-apa isu yang boleh dibicarakan dan oleh itu, soalan undang-undang atas had masa dan laches ditolak (lihat perenggan 17 & 20).

(3) Mahkamah mengesahkan penolakan permohonan perayu-perayu berikutan kepada A 18 k 19 KKM oleh hakim sesyen yang bijaksana memandangkan responden masih dalam masa yang ditetapkan untuk meneruskan dengan tuntutan terhadap kurangan jumlah yang kena dibayar oleh perayu-perayu selepas lelongan dan hasil jualan. Responden telah bertindak dalam cara ekuiti dan telah mematuhi terma-terma dan syarat-syarat perjanjian pinjaman dan surat jaminan yang mana dipersetujui oleh pihak-pihak (lihat perenggan 21).]

Notes

For cases on limitation in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6398–6459.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Tan Kong Min v Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601, FC (folld)

Legislation referred to

Limitation Act 1953 ss 6, 6(1)(a), (5)(b), 21, 21(1), (2), 26(1)
Rules of Court 2012 O 14, O 18 r 19, 19(1)(b), (1)(d)

Chong Choon Choy (CC Chong & Assoc) for the appellants.
Muhammad Nasim Shafie (Sidek Teoh Wong & Dennis) for the respondent.

Noorin Badaruddin J:

[1] The appellants lodged two appeals before this court against the decisions of the learned sessions judge allowing the summary judgment application filed by the respondent pursuant to O 14 of the Rules of Court 2012 and dismissing the striking out application by the appellants filed under O 18 r 19(1)(b) and O 18 r 19(1)(d) of the ROC 2012.

[2] On 23 January 2018, both appeals filed by the appellants were dismissed with costs by this court.

[3] In the sessions court via writ of summons and statement of claim dated 31 May 2017, the respondent (plaintiff in the sessions court) claimed for a sum of RM601,996.23 as at 27 February 2017 together with interests and costs:

(a) against the first appellant (the first defendant in the sessions court) as borrower of a housing loan granted to the first defendant pursuant to a loan agreement ('the loan agreement') dated 27 March 1995 entered into between the respondent and the first appellant; and

(b) against the second appellant (second defendant in the sessions court) as the guarantor of the housing loan granted to the first appellant pursuant to the terms of the letter of guarantee dated 27 March 1995 entered into between the respondent and the second appellant.

FACTS

[4] Earlier, the respondent had filed a writ of summons and statement of claim dated 21 July 2006 vide Kuala Lumpur Sessions Court No 7–52–19867–06 ('the first suit') against the appellants for breach of the terms of the loan agreement by not paying instalments and interest on the said loan to the respondent.

[5] The first suit was served on the appellants on 5 September 2006. Subsequently, the respondent withdrew the first suit without reserving its rights to file afresh.

THE ISSUES

[6] The main thrust of the appellants contention in both appeals is that the respondent's claim in particular against the second appellant as guarantor pursuant to the letter of guarantee is time barred as the claim is said to have been made more than six years and the respondent is estopped by s 6 of the Limitation Act 1953. Premised on that contention, the appellants also alleged that the respondent's claim is estopped by laches.

FINDINGS

[7] In this case, the property assigned to the respondent was auctioned off and from the proceed of sale there is still a shortfall amounting to RM601,996.23 calculated as at 27 February 2017. The auction was held on 30 August 2016 at the reserve price of RM49,500 and the full balance of the proceed of sale was received by the respondent on 22 November 2016. Due to the shortfall amount, the respondent had issued letter of demand dated 28 February 2017 demanding the amount owing by the appellants.

[8] This court agrees with the respondent's submission that the cause of action against the appellants here in would re-accrue once the respondent has ascertained the balance of proceed of sale. The Federal Court's decision in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 is forwarded to this court in support of the respondent's submission. In that case, two questions were posed before the Federal Court ie:

(a) whether a claim for balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s 6(1)(a) of the Limitation Act 1957('the Act') or a claim for money secured by charge on land and thereafter subject to limitation period of 12 years under s 21(1) of the Act? and

(b) if a claim for balance after sale is a contractual claim and therefore subject to the limitation period of six years under s 6(1)(a) of the Act, when does the cause of action accrue and the limitation period begin?

[9] In dismissing the appeal, the Federal Court held as follows:

(1) *Section 6 cannot apply in this case in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b) (see para 13). The applicable provision was s 21. Section 21(1) of the Limitation Act 1957 specifically refers to an action to recover moneys secured by a charge which is an action in personam, whilst s 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. The limitation period is therefore 12 years from the date when the right to receive*

the money accrued or 12 years from the date on which the right to foreclose accrued respectively (see para 14).

(2) The point in time where all the material facts were said to be in existence to render the cause of action complete would be after the sale had been conducted and the differential amount remaining due to the respondent had been ascertained (see para 24). Therefore, the earliest possible date the respondent could bring an action against the appellant for breach of his personal covenant under cl 7 is on 16 March 1992, being the date the property was sold by auction (see para 25).

(3) Since the respondent's cause of action arose on 16 March 1992, their action against the appellant which was filed on 17 January 1995 was filed well within the time prescribed in s 21(1) of the Act, ie 12 years (see para 26). This would therefore mean that the cause of action against the appellant as chargor as regards his personal liability in the present appeal will only accrue after the differential amount has been ascertained, ie after the land has been sold (see para 32).

(4) In short, the contractual provisions of the annexure to the charge provides for two separate causes of action. The first is statutory in nature, ie the foreclosure action under the National Land Code 1965 (action in rem). The second which arises only after the foreclosure action (and if there is still a surplus owing) is the action in personam against the chargor (see para 33). Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature (see para 35).

(5) The first notice of demand was issued by the respondent's solicitors on 18 August 1994 and subsequently, the respondent's solicitors issued another notice of demand against the appellant. Therefore, the limitation period only began to run from the expiry of the time specified for payment in the letter of 18 August, ie on 26 August 1994. The respondent's action, therefore, was filed well within the limitation period allowed under s 21(1) of the Act (see para 38).

(6) If, as suggested by the appellant, time begins to run from the time the appellant first defaulted, ie 25 September 1986 (seven days after the first demand was made), this would mean that the respondent should have proceeded by way of a civil suit (when the appellant defaulted in repayment of his housing loan) concurrently with realizing the security under the charge in order to avoid the danger of being caught by limitation, instead of realizing the security under the charge first and, upon the sale being concluded, to institute a separate action to recover the insufficient amount from the chargor personally as being done here. As was the case here, the respondent was not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the

amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance (see paras 40–41). (Emphasis added).

[10] Section 26(1) of the Limitation Act 1953 states:

Fresh accrual of action on acknowledgment or part payment where there has accrued any right of action to recover land or to enforce a mortgage or charge in respect of land or personal property, and —

(a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or

(b) in the case of any such action by a mortgage or charge the person in possession as aforesaid or the person liable for the debt secured by the mortgage or charge makes any payment in respect thereof, whether principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgment or last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[11] Apart from the clear guideline by the Federal Court in *Tan Kong Min*, parties herein are bound by the terms of the loan agreement entered into between them. Apparently, the provisions under the loan agreement clearly states that upon the first appellant being in default, the respondent is required to proceed with the auction and subsequently upon the receipt of the proceed of sale, is entitled to claim for the shortfall amount. The relevant provisions of the loan agreement are as follows:

Section 11.02:

If the Borrower (s) shall commit default pursuant to the terms herein or if any of the events stipulated in Section 11.01 hereof shall happened and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Lender requesting remedy of the same, or is not remedied within the time specifically stipulated therefore (if any) in respect of the event in question, all Advances or the Loan, interest thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Lender shall be entitled without further notice to be Borrower (s):

(a) terminate the licence hereinbefore referred to and to enter upon and take possession of the Property or any part thereof and to deal with all the rights interest of the Lender in relation to the Property or otherwise in all respect as the person absolutely and beneficially entitled thereto;

(b) let or lease the Property or any part thereof for such tenancy or term of years at such rent and upon such terms and conditions as the Lender shall in its absolute discretion think fit; and

(c) sell, transfer or assign the Property or any part thereof as the beneficial owner thereof at such price and in such manner and subject to such conditions as the Lender shall in its absolute discretion think fit free from any interest of the Borrower(s) hereunder or otherwise irrespective of whether the Charge on the Property has been registered in favour of the lender and no assignee or purchaser of the Lender shall be required or concerned to see whether any such default has infact been made by the Borrower(s) or any other occasion has arisen for the exercise of the Lender's rights and power of assignment or of the sale hereunder.

AND the Borrower(s) hereby expressly agrees covenants and undertakes to do and execute all acts deeds instruments and things which the lender may require or stipulate for the purposes of effecting and or completing anything and or any transaction mentioned in this Section.

Section 11.03:

All moneys received by the Lender from any proceeding instituted or step taken under any of the Security Documents shall be applied by the Lender:

FIRSTLY	in payment of all cost charges and expenses incurred and payments made by the Lender under the provisions of all or any of the Security Documents.
SECONDLY	in or towards payment to the Lender of all interest then accured and remaining unpaid in respect of the Loan, or the balance thereof for the time being owing.
THIRDLY	in or towards payment to the Lender of the principal sum due and remaining unpaid under the Loan.
FOURTHLY	in or towards payment to the Lender of all other moneys due and remaining unpaid under any or all of the Security Documents.
FIFTHLY	any surplus shall be paid to such persons entitled thereto.

PROVIDED ALWAYS THAT if the Lender shall be of the opinion that the security may prove deficient payments may be made to the Lender on account of principal before interest but such alteration in the order of payment shall not prejudice the right of the Lender to receive the full amount to which it would have been entitled if the primary order had been observed or any lesser amount which the sum ultimately realised from the security may be sufficient to pay.

Section 11.04:

If the amount realised by the Lender pursuant to the proceedings referred to in Section 11.03 hereof after the deductions thereof is less than the amount due and payable to the Lender and whether at such sale the Lender is the purchaser or otherwise, the Borrower(s) shall pay to the Lender the difference between the amount due and the amount so realised and until payment will also pay the Default Margin is addition to the Prescribed Rate on such balance.

[12] Upon entering into the loan agreement, the appellants have therefore agreed to the terms and conditions therein and they are bound by the same. The liability of the appellants in personam would re-accrue if there is any shortfall to be claimed after the proceed of sale. As such, this court must maintain and apply the agreed terms between the parties and to further preserve the agreed terms according to the structure of the loan agreement. Consequently the appellants allegation on the issue of laches is irrelevant since the respondent is still within the first year after the cause of action re-accrued.

[13] Premised on the guidelines enunciated by the Federal Court in *Tan Kong Min's* case, this court finds that the respondent had acted in equitable manner where the respondent has adhered and complied to the terms of the loan agreement which was agreed upon by the parties.

[14] The appellants distinguished the case of *Tan Kong Min* and submitted that the learned sessions judge erred in concluding that the decision of that case applies to the case herein. The appellants submitted that the ratio in *Tan Kong Min* can be distinguished where in that case the claim is only against the chargor of the land pursuant to the terms in the charge annexure and not against the guarantor or the borrower under the loan agreement or letter of guarantee. According to the appellants, notices of demand were issued on 8 May 2006 and 21 June 2006 and the first suit was filed to claim the amount due and owing under the same. The appellants submit that in the present case, the respondent can enforce its rights against the second appellant as the guarantor under the terms of the letter of guarantee and the loan agreement without first having to proceed with foreclosure proceedings against the first appellant as the borrower since the claim against the second appellant as guarantor is upon demand. The appellants submit further that the promise to pay the deficiency in the proceeds of sale under section 11.04 of the loan agreement does not create a new obligation to pay; it only applies to the old obligation to a reduced sum and the realisation of the security does not add to the cause of action; the cause of action is said to have accrued when the first suit was filed against the second appellant as guarantor and the first appellant as borrower. In the current case, the claim is against the second appellant as a guarantor under the letter of guarantee and not as chargor under the charge. Thus, it is the appellants' contention, the limitation period under the letter of guarantee which is contractual in nature, should be six years and not 12 years. According to the appellants the second appellant is not a chargor or assignee and there are no provisions in the deed of assignment giving the rights to the respondent to claim for the shortfall sum after the property is auctioned off.

[15] This court disagrees with the appellants contentions. Firstly, the respondent is exercising its right based on the loan agreement and not the deed of assignment. Secondly the fact that the second defendant is merely a

guarantor and not a chargor and said to be only liable under the terms of the letter of guarantee which is contractual in nature is not pleaded by the appellants. Thirdly the second appellant as a guarantor shall not be discharged until the settlement of the loan granted to the first appellant. The date of cause of action against the first appellant as the borrower will apply to the second appellant as a guarantor and the letter of guarantee must be read together with the loan agreement. The second appellant's obligations under the guarantee are co-extensive with the obligations of the first appellant as the borrower under the loan agreement. The second appellant as the guarantor has covenant to give unconditional guarantee as principal debtor and not merely as surety of the repayment to the respondent as the lender of the loan. The pertinent terms of the letter of guarantee are as follows:

> Section 2.01
>
> In consideration of the Lender's promise to grant the Loan to the Borrower at our request and upon such terms as the Lender deems fit, we hereby irrevocably and unconditionally guarantee as principal debtor and not merely as surety the repayment to the Lender the Loan together with interests, costs, charges and other sums payable by the Borrower under the terms governing the Loan in the event of the Borrower's default in the repayment of the Loan or any part thereof or in paying the interest due thereon or any sums payable or the breach of any terms governing the Loan by the Borrower. Our liability herein is co- extensive with that of the Borrower.
>
> Section 2.02
>
> If and whenever the Borrower shall make default in the payment of any moneys due and payable to the Lender or an Event of Default shall have taken place under the loan agreement, we shall on demand by the Lender forthwith pay all the moneys in regard to which such default has been made by the Borrower and any amount payable by the Borrower arising from such default as if we were the principal debtor.
>
> Section 2.03
>
> This Guarantee is in addition to and not in substitution for any other rights which the Lender may have against the Borrower or any third party and may be enforced without first having recourse to any such rights and without taking any step or proceedings against the Borrower or any other guarantor or indemnifier.

[16] As stated earlier, since the appellants have agreed on the terms/conditions requiring the respondent to proceed with foreclosure action first and followed by the shortfall claim (in personam) if any; after the proceeds of sale, the parties are bound by the terms of the agreement including the second appellant towards the letter of guarantee whereby the liability of the appellants in personam would re-accrue if there is any shortfall to be claimed after the proceed of sale. That is the intention of the loan agreement and the letter of guarantee. Therefore it is a basic justice for the court to preserve the terms and conditions of the parties agreement.

[17] Further at equity, foreclosure action also needs to be intiated first before civil action as the property charged to the respondent is a security pledged to be realised in order to reduce the outstanding amount owing by the appellants.

[18] The appellants also raised some trivial issues. The appellants alleged that they did not receive any information on the auction and proceed of sale. The respondent has submitted that the first appellant as the borrower was duly informed on the date of the auction vide registered post letter from the previous solicitor Messrs, Azhar & Wong dated 16 August 2016. By virtue of exh 'SAMN9' in the respondent's affidavit dated 7 August 2017 this court finds that the appellants were indeed informed.

[19] The appellants in their written submission in the sessions court had also invoked adverse inference against the respondent for not exhibiting the full page of the loan agreement. But this court finds that it is the appellants who filed the appeal record by producing only pp 40–45 of the loan agreement. Ironically, the appellants filed the complete pages of the loan agreement in the appellants exhibit (p 147 of the record of appeal). As such the appellants cannot be gainsaid to be unaware of the full content of the loan agreement. The issue is therefore discarded by this court. Likewise, other issues in relation to the missing pages of the deeds of assignments and the debenture are trivial issues highlighted to the court to manipulate the real issues herein.

[20] Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14 of the ROC 2012. As stated by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. This court agrees with the findings made by the learned sessions judge that trivial issues are not issues warranting a trial. This court is satisfied that the appellants have failed to raise any triable issues and the question of law on limitation and laches are rejected.

[21] The dismissal of the appellants application pursuant to O 18 r 19 of the ROC 2012 by the learned sessions judge is also upheld as the respondent is still within the time prescribed to proceed with the claim of the shortfall of the amount due and owing by the appellants after the auction and proceed of sale. The respondent has acted on equitable manner and has complied with the terms and condition of the loan agreement and letter of guarantee which are agreed upon by the parties.

A CONCLUSION

[22] Premised on the reasons alluded to in the above, this court dismissed both the appeals filed by the appellant with costs.

B *Both appeals dismissed with costs.*

Reported by Dzulqarnain Ab Fatar

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